Perembun (M) Sdn Bhd v Binas BMK Sdn Bhd and another case

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS 24C(ARB)-15–03 OF 2015 AND 24C(ARB)-15–10 OF 2014
MARY LIM J
3 JUNE 2015

Arbitration — Award — Enforcement — Application to recognise and enforce a corrective arbitration award — Arbitration Act 2005 s 39

Arbitration — Award — Setting aside — Application to set aside — Whether matter of computation within jurisdiction of arbitrator — Whether arbitrator had exceeded jurisdiction or terms of submission — Whether appointment of arbitrator invalid — Whether arbitrator exceeded powers under s 35 in making corrections to award — Award to be read as a whole — Allegations bare of requisite details — Application for setting aside dismissed — Arbitration Act 2005 ss 35, 36 & 37

Arbitration — Award — Setting aside — Application to set aside — Whether application filed out of time — Determining when time begins to run — Arbitration Act 2005 ss 35(4) & 37(4)

Arbitration — Award — Setting aside — Grounds of challenge — Precise ground of challenge to be identified — Failure to raise grounds of challenge during arbitration — Whether grounds of challenge may be raised in subsequent proceedings — Arbitration Act 2005 s 37

Civil Procedure — Striking out — Originating summons — Application to strike out originating summons on grounds limitation — Whether plainly clear that matter time-barred — Whether same principles as striking out writ of summons applicable — Rules of Court 2012 O 18 r 19(1)

Two related originating summons ('OS') were heard together. In the first OS, the applicant, Bina BMK Sdn Bhd ('Bina BMK') sought to recognise and enforce a corrective arbitration award dated 27 June 2014 ('the award') against two defendants; Magna Prima Construction Sdn Bhd ('Magna Prima') and Perembun (M) Sdn Bhd ('Perembun'). On 13 January 2015, the court varied the award and then recognised the varied award under s 38 of the Arbitration Act 2005 ('the Act') against Magna Prima. Bina BMK now sought to recognise

and enforce the award against Perembun. The application was resisted by Perembun. The second OS was filed by Perembun to challenge the award under ss 36(2) and 37 of the Act. Bina BMK applied to strike out this OS under O 18 r 19(1)(b) and/or (d) of the Rules of Court 2012 ('the ROC') on the grounds that: the challenge under s 37 was unsustainable because it was filed out of time and that the invocation of s 36(2) was misplaced. Bina BMK claimed that because the award was available for collection on 8 May 2014 (as informed by the arbitrator through his letter dated 5 May 2014), time should run from that date of availability for collection. Bina BMK had collected the award on 8 May 2014. After it had collected the award, Bina BMK had, on 4 June 2014, requested the arbitrator to correct the award under s 35(1) for typographical and calculation errors. Hence, the corrective award was rendered and was ready for collection on 27 June 2014. Perembun's challenge was on the corrective award. A challenge under s 37 had to be made within 90 days from the date on which Perembun received the award. According to Bina BMK, the relevant date was the first date when the award could have been collected, that was, 8 May 2014. Since the challenge was only filed on 24 March 2015, Bina BMK contended that the challenge was bad and must be struck out. Counsel for Perembun submitted that the relevant date was the date when it first came to be aware of the award and the corrective award, and that was on 23 January 2015 when Bina BMK served a notice under s 218 of the Companies Act 1965 on Perembun. Perembun filed the present application on 21 April 2015. Counsel for Perembun also argued that since Bina BMK had requested the arbitrator to correct the award under s 35, s 37(4) must be considered. This meant that the 90-day period should only run from the date when the request had been disposed of by the Arbitral Tribunal and more importantly, when Perembun received the corrective award. This would mean that the challenge under s 37 was within time. Perembun further contended that Bina BMK's request to the arbitrator to correct the award which effectively led to an increase of the award from RM21,819,350.41 to RM33,305,388.99 did not come within the meaning 'error in calculation', or clerical or typographical errors envisaged under s 35(1). It contended that the 'corrections' done by the arbitrator went beyond that which is allowed under s 36(2) and thus the corrective award was invalid. Perembun also claimed: that Perembun should not have been made a party to the arbitrations it never entered into any contract with Bina BMK; that the appointment of the arbitrator was invalid as it was not served with the notice of arbitration; that it was not involved in the execution of the works contract; that the award was invalid as it decided on matters which were beyond the provisions of cl 22.1 of the works contract; and that it never agreed that the award shall be final award save as to costs.

Held:

(1) An application to strike out the originating summons under O18 r 19(1) of the ROC on the ground of limitation may be entertained where it is

plainly clear that the matter is time-barred and unsustainable. The position in law is the same whether the application is to strike out a writ of summons or an OS; and whether the subject matter is a tort or civil action or, an arbitration award; *Bandar Builder Sdn Bhd v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 referred (see para 15).

(2) The challenge under s 37 was not filed out of time. The corrective award was rendered on 27 June 2014. The language in s 37(4) is more directory and in the absence of any evidence to the contrary, and since s 35(4) provides for time to run from the date the award is received; likewise, time should run from when the request to correct is disposed of and the decision including a corrective award was received. Hence, the application for the purpose of s 37 was filed within the 90 day period and it was properly before the court. Accordingly, the application to strike out was dismissed (see paras 7, 17 & 19).

(3) A complaint of non-compliance or violation of s 36(2) is insufficient. Perembun had to prove how a violation of s 36(2) came within any of the grounds found in s 37. There was no evidence to that effect. The matter of computation was one well within the jurisdiction of the arbitrator as is provided under ss 35 and 36. Consequently, as provided in s 36(1), the corrective award was final and binding on the parties (see para 24).

(4) Section 37 has no less than six substantive grounds of challenge under para 37(1)(a) and two more under para 37(1)(b). The precise ground should be identified at the time of challenge. Perembun selected grounds in paras 37(1)(a)(ii), (iii), (iv) and (v); and 39(1)(a)(ii), (iii), (iv) and (v). Despite all the complaints raised by Perembun, it actively took part in the arbitration. This amounted to knowledge or involvement in the works contract and/or the arbitration. Perembun had plenty of opportunities to raise these objections yet it did not. To do so now showed a want of good faith (see paras 38 & 45).

(5) In relation to Perembun's contention that the arbitrator and thereby the award had exceeded the jurisdiction or terms of submission to arbitration, there were no details or explanation as to what Perembun meant. Given that the allegation was bare of the requisite details and explanations of relevance, this claim was obviously misconceived and had to be dismissed. These allegations did not fall within any of the grounds relied on whether under s 37 or s 39 (see paras 47–48).

(6) The award, including the computation and calculation by the arbitrator when he made the corrections must be read as a whole. The award should never be read in parts. It should be read, viewed and understood as a single award. In so doing, the court found that the arbitrator had not

exceeded the power given under s 35 when he made the corrections seen in the corrective award (see para 49).

(7) Bina BMK's application to strike out was dismissed. Perembun's application to set aside the award under s 37 and its application to refuse recognition under s 39 were dismissed. Bina BMK's application to recognise as binding and to be enforced by entry as judgment in the terms as found in the corrective award as varied by the order of court on 13 January 2015 was allowed (see paras 50–51).

[Bahasa Malaysia summary

Dua saman pemula yang berkaitan ('SP') didengar bersama. Dalam SP pertama, pemohon, Bina BMK Sdn Bhd ('Bina BMK') memohon untuk mengiktiraf dan menguatkuasakan Award Pembetulan Timbang Tara bertarikh 27 Jun 2014 ('award') terhadap kedua-dua defendan; Magna Prima Sdn Bhd ('Magna Prima') dan Perembun (M) Sdn Bhd ('Perembun'). Pada 13 Januari 2015, mahkamah mengubah award itu dan kemudian mengiktiraf award yang diubah itu di bawah s 38 Akta Timbang Tara 2005 ('Akta') terhadap Magna Prima. Bina BMK kini berusaha untuk mengiktiraf dan menguatkuasakan award terhadap Perembun. Permohonan itu telah ditentang oleh Perembun. SP kedua difailkan oleh Perembun untuk mencabar award itu di bawah ss 36 (2) dan 37 Akta. Bina BMK memohon untuk membatalkan SP ini di bawah A 18 k 19 (1) (b) dan/atau (d) Kaedah-Kaedah Mahkamah 2012 ('KKM') atas alasan bahawa: cabaran di bawah s 37 adalah tidak mapan kerana ia difailkan di luar masa dan penggunaan s 36(2) adalah tidak bersesuaian. Bina BMK mendakwa kerana award boleh diambil pada 8 Mei 2014 (seperti yang dimaklumkan oleh penimbang tara melalui suratnya bertarikh 5 Mei 2014), masa perlu berjalan dari tarikh ketersediaan untuk pengambilan itu. Bina BMK telah mengambil award pada 8 Mei 2014. Selepas ia telah mengambil award itu, Bina BMK telah, pada 4 Jun 2014, meminta penimbang tara untuk membetulkan award itu di bawah s 35 (1) bagi apa-apa kesilapan tipografi dan pengiraan. Oleh itu, award pembetulan telah diberikan dan sedia untuk diambil pada 27 Jun 2014. Cabaran Perembun adalah mengenai award pembetulan itu. Cabaran di bawah s 37 perlu dibuat dalam tempoh 90 hari dari tarikh Perembun menerima award itu. Menurut Bina BMK, tarikh yang relevan ialah tarikh pertama apabila award itu boleh diambil, itu adalah, 8 Mei 2014. Memandangkan cabaran itu hanya difailkan pada 24 Mac 2015, Bina BMK menegaskan bahawa cabaran itu adalah tidak wajar dan mestilah dibatalkan. Peguam bagi Perembun berhujah bahawa tarikh yang relevan adalah tarikh apabila ia pertama kali menyedari award dan award pembetulan, dan itu adalah pada 23 Januari 2015 apabila Bina BMK menyampaikan suatu notis di bawah s 218 Akta Syarikat 1965 kepada Perembun. Perembun memfailkan permohonan ini pada 21 April 2015. Peguam bagi Perembun juga berhujah bahawa oleh kerana Bina BMK telah meminta penimbang tara untuk membetulkan award itu di bawah s 35, s 37 (4) perlu dipertimbangkan. Ini

bermakna tempoh 90 hari hanya perlu berjalan dari tarikh permintaan itu telah diselesaikan oleh Tribunal Timbang Tara dan yang lebih penting, apabila Perembun menerima award itu pembetulan. Ini bermakna bahawa cabaran di bawah s 37 adalah di dalam lingkungan masa. Perembun selanjutnya menegaskan bahawa permintaan Bina BMK kepada penimbang tara untuk membetulkan award yang secara langsung membawa kepada peningkatan daripada award itu daripada RM21,819,350.41 kepada RM33,305,388.99 tidak datang dalam pengertian 'error in calculation', atau kesilapan perkeranian atau kesilapan taipan yang dibayangkan di bawah s 35 (1). Ia menegaskan bahawa 'corrections' yang dilakukan oleh penimbang tara lebih daripada yang dibenarkan di bawah s 36 (2) dan dengan itu award pembetulan tidak sah. Perembun juga mendakwa: bahawa Perembun tidak patut dijadikan pihak kepada timbang tara yang tidak pernah memasuki apa-apa kontrak dengan Bina BMK; bahawa pelantikan penimbang tara itu tidak sah kerana ia tidak disampaikan dengan notis timbang tara; bahawa ia tidak terlibat dalam pelaksanaan kontrak kerja-kerja itu; bahawa award itu tidak sah kerana ia mengambil keputusan atas perkara-perkara yang di luar peruntukan klausa 22.1 kontrak kerja-kerja itu; dan bahawa ia tidak pernah bersetuju bahawa award itu adalah award muktamad hanya untuk penjimatan kos.

Diputuskan:

(1) Sesuatu permohonan untuk membatalkan saman pemula di bawah A 18 k 19(1) KKM atas alasan had masa boleh dipertimbangkan jika ia dengan nyata jelas bahawa perkara itu adalah terhalang oleh had masa dan tidak mapan. Kedudukan dalam undang-undang adalah sama ada permohonan itu adalah untuk membatalkan writ saman atau SP; dan sama ada perkara itu tersebut merupakan tort atau tindakan sivil atau, award timbang tara; *Bandar Builder Sdn Bhd v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 dirujuk (lihat perenggan 15).

(2) Cabaran di bawah s 37 tidak difailkan di luar masa. Award pembetulan telah diberikan pada 27 Jun 2014. Bahasa dalam s 37(4) adalah lebih direktori dan jika tiada apa-apa keterangan yang berlawanan, dan sejak s 35(4) memperuntukkan masa untuk bermula dari tarikh award itu diterima; begitu juga, masa perlu berjalan dari semasa permintaan untuk membetulkan ditentukan dan keputusan itu termasuk award pembetulan telah diterima. Oleh itu, permohonan bagi tujuan s 37 telah difailkan dalam tempoh 90 hari dan ia adalah betul di hadapan mahkamah. Oleh itu, permohonan untuk membatalkan ditolak (lihat perenggan 7, 17 & 19).

(3) Sesuatu aduan ketidakpatuhan atau pelanggaran s 36(2) tidak mencukupi. Perembun perlu membuktikan bagaimana pelanggaran s 36(2) datang dalam apa-apa alasan yang didapati dalam s 37(1). Tidak ada keterangan yang bermaksud sedemikian. Perkara pengiraan adalah

salah satu juga dalam bidang kuasa penimbang tara yang diperuntukkan di bawah ss 35 dan 36. Oleh itu, sebagaimana yang diperuntukkan dalam s 36(1), award pembetulan adalah muktamad dan mengikat pihak-pihak (lihat perenggan 24).

(4) Seksyen 37 mempunyai tidak kurang daripada enam alasan substantif cabaran di bawah perenggan 37(1)(a) dan dua lagi di bawah perenggan 37(1)(b). Alasan tepat perlu dikenal pasti pada masa cabaran. Alasan dipilih oleh Perembun pada perenggan 37(1)(a)(ii), (iii), (iv) dan (v); dan 39(1)(a)(ii), (iii), (iv) dan (v). Walaupun semua aduan yang dibangkitkan oleh Perembun, ia secara aktif mengambil bahagian dalam timbang tara. Ini berjumlah kepada pengetahuan atau penglibatan dalam kerja-kerja kontrak dan/atau timbang tara. Perembun mempunyai banyak peluang untuk membangkitkan bantahan ini tetapi ia tidak. Untuk berbuat demikian sekarang menunjukkan ketiadaan niat baik (lihat perenggan 38 & 45).

(5) Berkenaan hujahan Perembun bahawa penimbang tara dan dengan itu award itu melebihi bidang kuasa atau syarat-syarat pengemukaan kepada timbang tara, tiada maklumat atau penjelasan tentang apa yang dimaksudkan oleh Perembun. Memandangkan dakwaan itu adalah kosong tanpa butiran yang diperlukan dan penjelasan yang relevan, tuntutan ini adalah jelas satu salah faham dan terpaksa ditolak. Dakwaan tidak termasuk dalam mana-mana alasan yang disandarkan sama ada di bawah s 37 atau s 39 (lihat perenggan 47–48).

(6) Award, termasuk penghitungan dan pengiraan oleh penimbang tara apabila dia membuat pembetulan perlu dibaca secara keseluruhan. Award ini tidak boleh dibaca secara sebahagian. Perlu dibaca, disemak dan difahami sebagai award tunggal. Dengan berbuat demikian, mahkamah mendapati penimbang tara itu tidak melebihi kuasa yang diberikan di bawah s 35 apabila dia membuat pembetulan yang dilihat dalam award pembetulan (lihat perenggan 49).

(7) Permohonan Bina BMK untuk membatalkan ditolak. Permohonan Perembun untuk mengetepikan award di bawah s 37 dan permohonan untuk menolak pengiktirafan di bawah s 39 yang telah ditolak. Permohonan Bina BMK untuk mengiktiraf sebagai mengikat dan dikuatkuasakan melalui catatan sebagai penghakiman dalam syarat-syarat seperti yang terdapat dalam award pembetulan sebagaimana yang diubah oleh perintah mahkamah pada 13 Januari 2015 dibenarkan (lihat perenggan 50–51).]]]]

Notes

For cases on enforcement, see 1(2) *Mallal's Digest* (5th Ed, 2015) paras 1826–1843.

For cases on striking out in general, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 8706–9062.
For cases on setting aside, see 1(2) *Mallal's Digest* (5th Ed, 2015) paras 1912–1190.

Cases referred to

Bandar Builder Sdn Bhd v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, HC (refd)
Government of India v Cairns Energy & Anor [2014] 9 MLJ 149, CA (refd)

Legislation referred to

Arbitration Act 2005 ss 35, 35(1), (2), (4), 36(1), (2), 37, 37(1), (4), 38, 39, 42, 42(2)
Companies Act 1965 s 218
Rules of Court 2012 O18 r 19(1) O 18 r 19(1)(b) (d) O 69 r 5

Devan Narayanan Raman (Devan & Assoc) in Originating Summons No 24C(ARB)-15–03 of 2015 for the plaintiff.
Chong Phow Yew (Voon Aw Kam with him) (Kamaruzaman Arif, Amran & Chong) in Originating Summons No 24C(ARB)-15–10 of 2014 for the plaintiff.
Chong Phow Yew (Voon Aw Kam with him) (Kamaruzaman Arif, Amran & Chong) in Originating Summons No 24C(ARB)-15–03 of 2015 for the defendant.
Devan Narayanan Raman (Devan & Assoc) in Originating Summons No 24C(ARB)-15–10 of 2014 for the defendant.

Mary Lim J:

INTRODUCTION

[1] These two related originating summons are heard together, as agreed by the parties and the court.

[2] In the case of 24C(ARB)-15–10 of 2014, the applicant, Bina BMK Sdn Bhd ('Bina BMK') is seeking to recognise and enforce a corrective arbitration award dated 27 June 2014 against the two defendants; Magna Prima Construction Sdn Bhd ('Magna Prima'), and Perembun (M) Sdn Bhd ('Perembun'). The case against Magna Prima who had also filed 24C(ARB)-10–07 of 2014 challenging the award under ss 37 and 42 of the Arbitration Act 2005 ('Act 646') has already been disposed of. On 13 January 2015, the court varied the corrective award and then recognised the varied award under s 38 of the Arbitration Act 2005 ('Act 646'), against Magna Prima.

[3] Bina BMK is now seeking to recognise and enforce the same award, as

varied by the court, against Perembun. Initially, Perembun was under the mistaken impression that the order of the court dated 13 January 2015 was also an order made against Perembun; hence Perembun filed an application to set aside that order– encl 11. Upon sight of the draft order of court, Perembun withdrew that application. Enclosure 11 was consequently struck out with no order of costs on 18 March 2015.

[4] Insofar as the recognition under s 38 is concerned, the application is resisted by Perembun. Perembun relies on the same affidavit filed in support of the setting aside application; that is, encl 12; as well as another affidavit found in encl 17. I shall deal with the reasons and the grounds together with the grounds found in the second case, 24C(ARB)-15–03 of 2015 filed by Perembun to challenge the award under ss 37 and 42 of Act 646.

[5] In the second case, 24C(ARB)-15–03 of 2014, Perembun has challenged the corrective award under ss 36(2), 37 and 42 of the Arbitration Act 2005. To this, Bina BMK has filed an application to strike out the originating summons under O 18 r 19(1)(b) and/or (d) of the Rules of Court 2012; and/or inherent jurisdiction of the court– encl 4.

[6] Considering the arguments are all inter-related as similar grounds or reasons are relied on, both cases and the application in encl 4 were heard together. Parties, with leave of the court, were allowed to refer and rely on all the affidavits filed in both cases in support of the arguments made.

APPLICATION TO STRIKE OUT

[7] I shall take the application to strike out first given that it is on a very narrow ground, and that is, both the challenges under ss 37 and 42 are unsustainable because they were filed out of time; that the invocation of s 36(2) is misplaced; and that the application under s 42 is misplaced as no questions of law have been posed. The application found in encl 4 is pursuant to O 18 r 19(1)(b) and/or (d) of the Rules of Court 2012.

[8] Bina BMK's argument on limitation is this: that because the award was available for collection on 8 May 2014 (as informed by the learned arbitrator through his letter dated 5 May 2014), time should run from that date of availability for collection. In fact, Bina BMK had collected the award on 8 May 2014.

[9] After it had collected the award, Bina BMK had, on 4 June 2014, requested the learned arbitrator to correct the award under s 35(1). Bina BMK pointed out what it considered to be typographical and calculation errors. Vide letter dated 19 June 2014, the learned arbitrator invited the parties to make

their submissions on the request. The parties did so and this led to a corrective award being rendered. The corrective award was ready for collection on 27 June 2014. Perembun's challenge is on the corrective award.

[10] Bina BMK takes the position that both the challenges are time-barred. A challenge under s 37 must be made within 90 days from the date on which Perembun received the award while a challenge under s 42 must be within 42 days of the publication of the award. This is provided under sub-ss 37(4) and 42(2) respectively. According to Bina BMK, the relevant date is the first date when the award could have been collected, that is, 8 May 2014. Since the challenge was only filed on 24 March 2015, Bina BMK contended that the challenge is bad and must be struck out.

[11] Learned counsel for Perembun submitted that the relevant date is the date when it first came to be aware of the award and the corrective award, and that was on 23 January 2015 when Bina BMK served a notice under s 218 of the Companies Act 1965 on Perembun. Perembun filed the present proceedings on 21 April 2015.

[12] For the purpose of the s 42 challenge, learned counsel for Perembun conceded that the challenge is made out of time. Although there was some indication that Perembun would be looking to extend time for this challenge, learned counsel for Perembun did not pursue this and the challenge under s 42 was abandoned. Therefore, the challenge under s 42 will not be addressed.

[13] However, in respect of the challenge under s 37, learned counsel for Perembun argued that since Bina BMK had requested the learned arbitrator to correct the award under s 35, then sub-s 37(4) must be considered. This meant that the 90-day period should only run from the date when the request had been disposed of by the arbitral tribunal and more importantly, when Perembun received the corrective award. Since Perembun only received the corrective award on 23 January 2015, the 90-day period should be calculated from that date. This would then mean that the challenge under s 37 is well within time.

[14] Learned counsel for Perembun further relied on O 69 r 5 of the Rules of Court 2012 in support. Alternatively, learned counsel for Perembun invited the court to extend time on the ground that it had only received the corrective award on 23 January 2015.

[15] An application to strike out the originating summons under O 18 r 19(1) Rules of Court 2012 on the ground of limitation may be entertained where it is plainly clear that the matter is time-barred and unsustainable– see *Bandar Builder Sdn Bhd v United Malayan Banking Corporation Bhd* [1993] 3

MLJ 36. The position in law is the same whether the application is to strike out a writ of summons or an originating summons; and whether the subject matter is a tort or civil action or, an arbitration award.

[16] However, in the present case of a challenge under s 37, I am of the opinion that the challenge is not filed out of time. Although sub-s 37(4) requires the application to set aside the award to be filed within 90 days from the date of the award, the facts show that there was a request for a correction made under para 35(1)(a). That request was made by Bina BMK through their letter dated 4 June 2014. Perembun was aware of that request as its counsel, who attended on its behalf at the arbitration proceedings and is before the Court in the present proceedings was duly notified by Bina BMK's solicitors by letter of even date– see exh 'A-1' in encl 5 which shows the acknowledgment by Perembun's solicitors.

[17] Where the learned arbitrator considers such a request 'justified', sub-s 35(2) obliges the learned arbitrator to make a correction within 30 days of the receipt of the request. Here, the learned arbitrator considered the request justified and he has published the corrective award within the stipulated time period. The corrective award was rendered on 27 June 2014.

[18] For the purpose of an application to set aside such a corrective award, sub-s 37(4) provides that the application 'may not be made after the expiry of ninety days ... from the date on which that request had been disposed of by the arbitral tribunal'.

[19] According to Perembun, it was not aware of the corrective award till it was served with the notice under s 218 of the Companies Act 1965 on 23 January 2015. There is no evidence to contradict this. The language in sub-s 37(4) is more directory and in the absence of any evidence to the contrary, and since sub-s 35(4) provides for time to run from the date the award is received; likewise, time should run from when the request to correct is disposed of and the decision including a corrective award is received. In my view, the application for the purpose of s 37 is filed within the 90 day period and it is properly before the court. Accordingly, Bina BMK's application to strike out is dismissed.

Challenge under section 37

[20] Moving next to the challenge under s 37. For this, Perembun is also relying on sub-s 36(2) which states:

A

36(1) An award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding on the parties and may be relied upon by any party by way of defence, set-off or otherwise in any proceedings in any court.

B

(2) The arbitral tribunal shall not vary, amend, correct, review, add to or revoke an award which has been made except as specifically provided for in section 35.

C

[21] Taking first the argument under sub-s 36(2). The relevant parts of Perembun's affidavit filed in support (encl 2) are paras 23 and 24 (pp 10–11). This is what happened.

D

[22] By letter dated 4 June 2014, Bina BMK requested the learned arbitrator to correct the award which effectively led to an increase of the award from RM21,819,350.41 to RM33,305,388.99. After considering submissions which the learned arbitrator had invited from both parties, the learned arbitrator agreed. Perembun argues that such a request does not come within the meaning 'error in calculation', or clerical or typographical errors which is what is envisaged under sub-s 35(1). It contended that the 'corrections' done by

E

the learned arbitrator went beyond that which is allowed under sub-s 36(2). This means that the corrective award is invalid.

F

[23] Learned counsel for Bina BMK submitted that Perembun's complaint of a violation of sub-s 36(2) in an application to set aside under s 37 is misconceived and unsustainable. In short, Perembun can only raise any of the grounds found in sub-s 37(1).

G

[24] In this respect, I am of the view that on its own and without more, a complaint of non-compliance or violation of sub-s 36(2) is insufficient. What is required of Perembun is that it must prove how a violation of sub-s 36(2) comes within any of the grounds found in sub-s 37(1). If Perembun fails, then the whole application must necessarily fall.

H

[25] I have not seen any evidence to that effect. Instead, the court is of the view that the matter of computation is one well within the jurisdiction of the learned arbitrator as is provided under s 35 and 36. Section 35 empowers the learned arbitrator to deal with requests to correct, interpret or make an additional award. The correction has to be in respect of computation, clerical

I

or typographical errors or errors of similar nature; while the interpretation is of a specific point or part of the award– see sub-s 35(1). The power to make an additional award is also in a limited and restrictive sense, and that is where there is already a claim presented in the arbitral proceedings but the learned arbitrator has omitted it from the award– see sub-s 35(4).

[26] In this case, the learned arbitrator had invited the views of both parties before it corrected the earlier award. In the corrective award, the learned arbitrator has also categorically pointed out the relevant paragraphs, stated that there were 'accidental slips ... made in the computation of the sums due to the claimant/first respondent/respondents and some typographical errors'; and that he was 'exercising the powers given ... pursuant to s 35(1)(a) of the Arbitration Act 2005 to correct such accidental slips'.

[27] After setting out how the relevant paras should read, the learned arbitrator then said at para 4.0:

> Consequently, para 283 should read as follows:
>
> *283* After taking into consideration the additions and deductions of values of various heads of claims, a decision was arrived at that the claimant is entitled to claim for an amount of *RM 34,182,839.48*.

[28] The learned arbitrator followed this pattern of corrections for the remaining paras such as 301, 322 and so on and so forth; each time highlighting in bold the affected paragraphs and the changes brought about by the correction and re-calculation. I do not see anything wrong in that. That is precisely why and what ss 35 and 36 are intended for and that is what happened here.

[29] Consequently, as provided in sub-s 36(1), the corrective award is final and binding on the parties before the court.

[30] In relation to the substantive challenge under s 37, and here, I shall also be taking the arguments under s 39 as Perembun is challenging the recognition and enforcement of the corrective award, as varied by the court on 13 January 2015. The provisions of s 39 substantially mirror those in s 37.

[31] These are Perembun's principal complaints.

[32] First, Perembun claims that it never entered into any contract with Bina BMK. While Perembun admits it is a party to a joint venture known as MPV-Perembun JV ('JV'), that JV is not a partnership. The construction contract which lies at the heart of the award and corrective award was a contract dated 17 November 2005. That contract which incidentally contained the arbitration agreement can be found at p 90 was a contract to develop Lot 4086 at Jalan Kepong, Kuala Lumpur. Perembun claimed that this development contract was between Bina BMK and MPV-Perembun JV; Perembun claims that it was not involved. It also claims that N Chanthiran a/l Nagappan who signed that contract; on behalf of the JV, was not authorised to sign on its

behalf. Therefore, it was wrong for Perembun to have been made a party to the arbitration.

[33] Further, Perembun claimed that it was not served with the notice of arbitration. In this regard, it claimed that there was non-compliance of cl 22.2(i) of the contract on the appointment of the arbitrator. Because it was not served with the notice of arbitration or a notice to concur on the appointment of arbitrator, Perembun contended that the appointment of the learned arbitrator was invalid. Various allegations on the competency and the qualifications of the arbitrator were then made.

[34] In relation to the works contract, Perembun claimed it was not involved in its execution, that it was Magna Prima who gave all instructions in relation to the works under the contract; that Bina BMK dealt directly with Magna Prima; and that Magna Prima had made all payments under the contract. The contract was also terminated by Magna Prima; and not Perembun.

[35] Perembun also contended that the award was invalid as it decided on matters which were beyond the provisions of cl 22.1 of the works contract. Clause 22.1 read with 'cll 20.1(i) to (vi)' is said to restrict the matters that may be referred to and consequently decided by the learned arbitrator.

[36] Another contention raised by Perembun is that it never agreed that the award shall be final award save as to costs. Perembun's defence to the claimant's points of claim was relied on in support. Perembun also referred to the fact that since it did not file any submissions in the arbitration, the obligation to pay the sum mentioned in the award was Magna Prima and not Perembun's.

[37] It is useful to remind oneself the provisions of s 37:

> 37 Application for setting aside
>
> (1) An award may be set aside by the High Court only if–
>
> (a) the party making the application provides proof that–
>
> (i) a party to the arbitration agreement was under any incapacity;
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;
>
> (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to sub-s (3), the award contains decisions on matters beyond the scope of the submission to arbitration;

(2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where–

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred–

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

[38] As can be seen from the above, s 37 has no less than six substantive grounds of challenge under para 37(1)(a) and two more under para 37(1)(b). The court observes that Perembun has not identified which of those ground(s) of challenge that it is invoking. While it may have stated its reasons or complaints as listed above, I am of the opinion that Perembun should nevertheless identify the precise provision of law that affords that particular ground or basis of challenge that it relies on to set aside the corrective award; or how the reasons or complaints come within the particular ground in sub-s 37(1) that is relied on. It is only fair and proper that the precise ground should be identified at the time of challenge; and not left for all to guess at or during the hearing of the originating summons. Here, the absence of such an invocation has caused some difficulties in discerning what is precisely Perembun's complaints.

[39] The court sought clarification; and learned counsel for Perembun thereupon informed the court that the 'selected' grounds were paras 37(1)(a)(ii), (iii), (iv) and (v); and 39(1)(a)(ii), (iii), (iv) and (v). While I do not find this proper, there is no real challenge from Bina BMK on this; I shall nevertheless proceed to deal with those challenges; although such is not encouraged.

[40] I have discussed the jurisprudence and the relevant tests for a challenge under s 37 in the case of *Government of India v Cairns Energy & Anor* [2014] 9 MLJ 149; and I do not propose to go through them again, save to apply the same. That decision has been affirmed by the Court of Appeal.

[41] Taken at its highest, Perembun's complaints relate to Perembun's involvement in the works contract and thereby the manner and circumstances under which the dispute was referred to arbitration or how the arbitration

clause was invoked; how the arbitration proceedings were conducted; the allegations of bias against the learned arbitrator; and the contents of the award.

[42] Dealing first with Perembun's complaints on its involvement or lack of involvement in the works contract and that it was not notified about the invocation of the arbitration clause, that N Chanthiran a/l Nagappan was not authorised to sign on its behalf and that it was wrong for Perembun to have been made a party to the arbitration; the court observes that despite all these complaints, Perembun took part in the arbitration. In fact, there is evidence aplenty to that effect; and the evidence readily reveal that Perembun took a fairly active part by attending before the learned arbitrator for directions as to the conduct of the arbitration; it was represented by legal counsel; it filed a defence to the claimant's points of claim; submitted documents for use in the arbitration; and its learned counsel cross-examined the witnesses during the arbitration proceedings (at least five witnesses). The deponent of the affidavit before the court in the present proceedings had even a witness statement dated 6 April 2009 prepared under his name but it was not signed or finally used. The evidence also shows that Perembun's legal counsel attended a substantial part of the arbitration proceedings. Perembun, through its counsel attended until day 49 on 23 February 2011; the arbitration proceedings took 69 hearing days. If that does not amount to knowledge or involvement in the works contract and/or the arbitration, with respect, it is unclear what would be.

[43] It appears that Perembun ceased attending arbitration proceedings because of what had transpired in a suit filed by Perembun against Magna Prima before the High Court at Kuala Lumpur (Civil Suit No S-22–711 of 2006)– see encl 15 in the cause papers relating to KL High Court Originating Summons No 24C(ARB)-15–10 of 2014. On 10 March 2011, the parties had entered into a consent judgment in that suit and the terms of the consent judgment are very telling. In the consent judgment, Magna Prima, inter alia, agreed to:

> (c) *Defendan-defendan akan mengambil alih dan melepaskan plaintif mulai dari tarikh 10 Mac 2011 dari segala tanggungjawab sebagai responden kedua dalam prosiding arbitration di antara Bina BMK Sdn Bhd dengan Magna Prima Construction Sdn Bhd responden pertama dan Perembun (M) Sdn Bhd responden kedua.*
>
> (d) *Kedua-dua pihak tidak akan menuntut apa-apa atas apa-apa kesan dan keputusan yang timbul di dalam prosiding arbitration seperti di klausa (c).*

[44] As deposed by Abd Aziz bin M Khalid on behalf of Bina BMK, Perembun had entered into a settlement and a consent judgment with Magna Prima whereby Magna Prima and its parent listed company, Magna Prima Bhd had, amongst others, agreed to indemnify Perembun from its liability as the second respondent in the arbitration proceedings. Following this, Perembun's

solicitors wrote to the learned arbitrator on 10 March 2011 stating that they were no longer representing Perembun and that M/s Ringo Low & Assoc, the solicitors for Magna Prima in the arbitration proceedings 'had taken on to act on behalf of them'. This was immediately disputed by M/s Ringo Low & Assoc. A copy of the consent judgment was then sent to the learned arbitrator by Perembun. Subsequently, Perembun's solicitors reminded M/s Ringo Low & Assoc of its client's 'promise to indemnify and keep our client safe for the consequences of the arbitration' vide its letter dated 23 November 2011.

[45] All this and as suggested by Bina BMK, show that contrary to what Perembun is now asserting, it was very much involved in the works contract; and was aware of and was involved in the arbitration proceedings. It had also never objected or raised any objections on the appointment of the learned arbitrator; or any of the issues that it now raises. The challenge and allegations made against the learned arbitrator ought to have been raised promptly under s 15. Since Perembun did not, the allegations cannot be entertained and must be disregarded. I agree with learned counsel for Bina BMK that Perembun had plenty of opportunities to raise these objections through its legal counsel; yet it did not. To do so today, are in my opinion speaks of a want of good faith.

[46] In any case, there is no proof of the matters alleged against the learned arbitrator. These allegations of bias and lack of impartiality are serious and must be proved. Since there is none, these allegations which are described as 'wild and unfounded' must be dismissed and the related paras expunged from the records.

[47] I must further point out that Perembun had contended that the learned arbitrator and thereby the award had exceeded the jurisdiction or terms of submission to arbitration on the ground that cl 22.1 of the works contract must be read with cl 20.1(i) to (vi). First and foremost, there are no details or explanation as to what Perembun means. Further, Perembun's claim is misplaced since cl 20.1 has only three sub-provisions, namely (i), (ii) and (iii) while Perembun had alluded to three others which are non-existent. Given that the allegation here is bare of the requisite details and explanations of relevance, this claim is obviously misconceived and must be dismissed. These allegations certainly cannot and do not, fall within any of the grounds relied on, be it under ss 37 or 39.

[48] Contrary to Perembun's contentions, none of the allegations or complaints resonate in any of the grounds relied on. I do not find any of the grounds proved, be it under ss 37 or 39; and these sections do require Perembun to prove its charges. It has not.

[49] Lastly, I must remind parties that the award, including the computation

and calculation by the learned arbitrator when he made the corrections must be read as a whole. The award should not never be read in parts. It should be read, viewed and understood as a single award. In so doing, I do not find the learned arbitrator to have exceeded the power given under s 35 when he made the corrections seen in the corrective award. This allegation must also necessarily fail.

[50] The upshot is as follow. First, as mentioned earlier, Bina BMK's application to strike out is dismissed. Next, Perembun's application to set aside the award under s 37 and its application to refuse recognition under s 39 are dismissed.

[51] Consequently, Bina BMK's application to recognise as binding and to be enforced by entry as judgment in the terms as found in the corrective award as varied by the order of court on 13 January 2015 is hereby allowed. The paragraphs in the affidavits referring to bias and such conduct in respect of the learned arbitrator are expunged from the records. Finally, the court orders Perembun to pay Bina BMK costs of RM20,000.

Order accordingly.

Reported by Kanesh Sundrum